85-1666

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RODNEY HOSFORD,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

JACK F. WHITE, JR.
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Quincy, Florida 32351

Counsel For Petitioner

431

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES COURT OF APPEALS FAILED TO PROPERLY ASSESS THE IMPACT OF THE GOVERNMENT'S FAILURE TO PRODUCE IMPEACHMENT RECORDS.

II

WHETHER THE INJECTION OF SIMILAR BAD ACT EVIDENCE DEPRIVED THE PETITIONER OF A FAIR TRIAL.

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KEY TO RECORD ON APPEAL REFERENCES

The following designations will be used in making references to the Record on Appeal and will be followed by a space and then the page number:

TTD	Petitioner Rodney Coe Hosford
TTF	Witness Richard Ray Fillingim
TTW1	Witness David A. Warren, 1st Vol.
TTW2	Witness David A. Warren, 2nd Vol
TTW3	Witness David A. Warren, 3rd Vol.
TTH	Witness James Herring
TT1	First Day of Trial Proceedings
TT2	Second Day of Trial Proceedings
TT3	Third Day of Trial Proceedings
TT4	Fourth Day of Trial Proceedings

TT5	Fifth Day of Trial Proceedings
TT6	Sixth Day of Trial Proceedings
TT7	Seventh Day of Trial Proceedings
TT Jury Arguments	Transcript of Jury Arguments
TTV1	Witness Charles Viccica, 1st Vol.
TTV2	Witness Charles Viccica, 2nd.Vol.
R	Refers to the papers and materials filed with the Trial Court from the docket sheet.

OPINION BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, was issued on February 19, 1986. The opinion is reproduced in the Petitioner's Appendix at A1-A16.

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals, Eleventh Circuit was rendered on February 19, 1986, affirming the district court's judgment of conviction on two counts, one of violating the Racketeering Influenced and Corrupt Organizations Act, and one, for soliciting and attempting murder. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. §1254 (1)

STATEMENT OF THE CASE

On December 7, 1983, the Petitioner was charged by a Federal Grand Jury with being employed by and associated with an enterprise as defined by Title 18, United States Code, section 1961(4), which affected interstate commerce, which enterprise was a racketeering activity to bring about the murders of certain individuals.

In a second count, he was charged with a conspiracy to do the same thing under Title 18, United States Code, section 1962(c). (R 8)

He entered a plea of not guilty as charged to both counts on December 14, 1983. (R 40-41)

The following motions material to this petition were made by the Petitioner at the times indicated and were ruled upon by

the trial judge on February 14, 1984, as indicated after the description of each motion: (R 65)

December 19, 1983, Motion for Early Discovery of Jenck's Act Material (R 58) was granted as unopposed. (R 165)

December 19, 1983, Motion for Pretrial Discovery of the Government's Intention to Rely on Similar Act Evidence (R 61) was granted as unopposed. (R 165)

December 19, 1983, Motion for Production of Favorable Evidence (R 69) was granted as unopposed. (R 165)

December 19, 1983, Motion for Discovery and Inspection (R 125) was granted to a limited degree; but the Court specifically ruled:

> The Government will permit the Defendant to inspect and copy all tangible items in the Government's possession which are material to his defense, intended by the Government for use as evidence in

> chief at the trial or which were obtained from or belong to the Defendant. (R 165) (Emphasis supplied)

On March 1, 1984, the Petitioner filed his Motion in Limine seeking an order preventing the Government's witnesses from testifying about matters concerning pending passport violations and alleged cocaine dealing with Government witness James Herring (R 201) and, on the same day, filed a Motion to Suppress Certain Statements of the Petitioner (R 197). This concerned the agreement between Petitioner and the Government not to use any statements made by the Petitioner in any prosecution except for perjury or obstruction of justice.

The Motions were considered on the first day of trial and generally deferred to be raised as appropriate as the trial progressed. (TT1 3)

Petitioner asserted that he conspired with Government agent Herring with knowledge of the agency and with the conviction, based upon the agent's representation, that Petitioner was assisting in inducing and assisting the murder plot of others in order to gather evidence sufficient to convict such other parties in a matter which would provide pay-off from the third parties to the Petitioner and Herring, which they could retain. (TTD 50-68) The government, while denying the legal facts of agency, acknowledged the existence of all facts which would render Herring a Government agent. The Government conceded that Petitioner, consistent with his assertions, produced evidence against the third parties but asserted that

he did not know of the agency of Herring and performed all acts with the criminal intent that the murders occur. (TTW1 5-8, 143, 157-160)

The Government did not arrest Petitioner until almost thirty days had elapsed after the last "criminal" activity by him. (TTW1 101)

During the thirty-day period, the Government inexplicably did not orchestrate the conclusive circumstances that would have arisen had it told its Agent Herring to tell Petitioner that one of the three murders had been completed. Under such circumstances, Petitioner would have, if guilty, demonstrated satisfaction and thereby foreclosing the defense obviously anticipated by the Government, i.e., a strong statement by Petitioner upon being told that one of the murders

had been completed that such was absolutely contrary to his intent and desire.

The Government was permitted to inject into the trial similar bad act evidence that the Petitioner had stolen money from Southeastern Greyhound Racing Kennels, Inc., that he had bribed post office employees to forge fraudulent passports, that he was involved in cocaine trafficking and that he planned the burning of a nursery to collect insurance proceeds. (TTW1 5, TTH 4, TTV 5, TTV 27-28, TTW3 4 and TTW4 26)

The unproduced books and records of Southeastern Greyhound Racing Kennels, Inc., were obtained from the Petitioner and had been ordered produced by the district court order. (R 165)

The Petitioner was convicted on both counts as charged. (R 56) A Motion for new trial was filed on March 15, 1983 (R 288) and denied on April 5, 1983. (R 307)

The Petitioner was sentenced on Count One to 1 to 12 years and fined $25,000.00; on Count Two he was sentenced 2 to 12 years with a fine of $25,000.00, the imprisonment and fines to run consecutiv to those imposed in Count One. (R 350)

The conviction was affirmed by the Court of Appeals on February 19, 1986; this petition ensues.

REASONS FOR GRANTING THE WRIT

After the briefs were filed and before oral argument before the court of appeals, the Petitioner served a notice of intent to rely upon additional

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authorities including United States v. Bagley, United States Supreme Court Slip Opinion No. 84-48, decided July 2, 1985.

The Government argued, both by brief and orally, that no specific request was made for the unproduced records. As Petitioner understands Bagley, supra, this argument becomes immaterial if there was a reasonable probability that timely production would have produced a more favorable result.

The Court of Appeals refused to reach the merits of the non-production issue because it felt the error, if any, was harmless because of overwhelming evicence of guilt.

This analysis was apparently based upon tapes of conversations between

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Petitioner and government agents, which were, in most part, subject to enhancement to be at all intelligible.

Agent Warren was caught in one lie on the record which could have been construed as a mistake. (TTW 125,129) Had trial counsel been apprised of the intended use of the kennel records and had shown by an independent accountant that the conclusion of dishonesty was unjustified under any interpretation then the keystone of the government's case could have easily fallen in a dramatic De Lorean manner.

The record in this case reveals almost no evidence of guilt which is not suspect. The tapes were mostly inaudible and "enhanced" to be understood, government witness Herring admitted his involvement in

criminal activities and agent Warren lied under oath. Had the jury believed that agent Warren intentionally lied about Petitioner's alleged dishonest dealings with the kennel corporation it is unlikely that they would have convicted. This is expecially true because Petitioner's credibility would have correspondingly been enhanced.

This Court in Bagley cautioned a court reviewing a failure to produce thus:

> "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."

The appellate court did not call for the unproduced material even though the motion of Petitioner for an order of

production was carried with the case by order of the Honorable Joseph W. Hatchett, Circuit Judge. Thus, the appellate court could not assess the impact of it's production. A 17

SIMILAR BAD ACT EVIDENCE

It is probably fair to say that while Petitioner urges the circumstances of his case come within the standards of United States v. Dothard, 666 F.2d 498, the Government tried the case under its interpretation of the application of United States v. Kloock, 652 F.2d 492.

In Kloock, supra, the defendant was apprehended by customs agents and employees who had become suspicious about a sticky bathmat in Kloock's suitcase, which turned out to be impregnated

with cocaine. Kloock had a false Michigan driver's license under the name of Leyland in his possession at the time, and his plane ticket was under the name of George Wilson; his defense was lack of intent (no knowledge of the cocaine).

The Court of Appeals, in affirming the conviction, noted that the false license was highly probative on the issue of intent and the danger of unfair prejudice slight.

As can be seen from the portions of the record set forth in this case, not one of the collateral issues was in any way essential or probative to the issues raised in the indictment.

In Dothard, supra, the prosecution was for making a false statement

to a recruiting officer by denying on a recruiting application that defendant had been convicted of a prior criminal offense. The Government was permitted to introduce into evidence prior misconduct to show a "pattern or practice" in making the incorrect statements on his enlistment application. The court reversed the conviction, holding that neither Rule 404(b) of the Federal Rules of Evidence nor the cases dealing with admissibility of such evidence authorized the prior similar act evidence.

Finally, weighing (as Dothard, supra,requires) the prejudice against the probative value, there can be no question that the prejudice was overwhelming since the Government used the acts to show that Defendant had broken his

agreement with Government as an informant. But that was unnecessary, since a showing that Defendant committed the offenses for which he was being tried was sufficient to prove that.

CONCLUSION

The court of appeals has rendered a decision which has so far sanctioned a departure from the accepted and usual course of judicial proceedings by failing to review Petitioner's conviction in the light of Bagley, supra, as to impose a denial of due process of law upon the Petitioner.

Petitioner respectfully submits that this case involves a substantial federal question which should be resolved by this Court, and respectfully requests

that this Court grant the petition for writ of certiorari to the United States District Court of Appeals, Eleventh Circuit.

Respectfully submitted,

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A P P E N D I X

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Rodney HOSFORD,
Defendant-Appellant.

No. 85-3036

United States Court of Appeals
Eleventh Circuit.

Feb. 19, 1986

PUR CURIAM:

In May, 1983, the defendant-appellant, Rodney C. Hosford, entered into a use immunity agreement with the United States Customs Service. At that time he admitted to prior criminal acts, including the acquisition of fraudulent passports. The agreement required Hosford to cooperate with the government and to inform the Customs Service whenever he became aware of any illegal activity. Subsequently, in October, 1983, the Customs Service was investi-

gating Hosford for his alleged involvement in a plan to prepare and acquire fraudulent passports. During the course of the investigation the government recorded conversations between Hosford and a cooperating witness, James Herring. In these conversations Hosford sought Herring's aid in helping to murder three men. He provided Herring and a special government agent posing as a "hit man" with photographs of the men, and specified the amount of money to be paid for each murder. He also stated that he had hired another killer earlier to accomplish the same purpose, but that the individual subsequently turned down the proposition. At no time did Hosford inform the government about the proposed murders. He was arrested

and tried in the United States District Court for the Northern District of Florida for soliciting and attempting murder.

During his trial, Hosford maintained that he was aware Herring was a government agent and that his actions therefore conformed with his immunity agreement to cooperate with the government. Hosford also contended that he had encouraged the murder plots to aid the government in what he perceived to be its goal of gathering evidence against those persons who had ordered the killings. Hosford was found guilty of two counts of violating the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68, for soliciting and attempting murder.

He appeals that conviction, asserting eleven errors of law.

(1) Hosford first claims that Herring's testimony was unfairly obtained because the cooperating witness testified pursuant to an improper use immunity agreement. This immunity agreement provided that Herring would cooperate with the government and that the United States would not use any of Herring's statements against him so long as he told the truth. At some time after Herring entered into the contract the government agreed to expedite the release of a boat owned by Herring that was subject to a civil seizure claim. According to Hosford, this accommodation constituted an impermissible purchase of testimony. The government's use of paid informants

does have limits. United States v. Richardson, 764 F 2d 1514, 1520 (11th Cir. 1985). In this case, however, the release of Herring's boat was keyed to Herring's cooperation with the government, not his testimony against Hosford. The government clearly did not abuse its discretion in granting Herring a use immunity agreement whose terms were designed to inspire truthful testimony. See id.

(2,3) As a second error, Hosford contends that the government selected David McGee as lead prosecutor because McGee previously had participated in the creation and execution of Hosford's use immunity agreement.

Since the agreement was the keystone to Hosford's defense, he reasons that it was inevitable that the jury, through testimony by witnesses and the defendant, would become aware of McGee's involvement. These revelations, which did occur at trial, in Hosford's view clothed McGee with de facto witness status and accorded him "witness verity" with the jury, thereby violating Hosford's due process rights.[1]

[1]As a threshold matter, we note that Hosford did not make this objection in the district court. As a general rule, an appellant may not assert theories on appeal that were not pursued at trial or preserved by means of a timely objection. See Lampkin v. Ricketts, 551 F 2d 680 (5th Cir. 1977), cert. denied, 434 U.S. 957, 98, S.Ct. 483, 54 L Ed. 2d 316 (1977). However, on the facts of this case and since this issue is a question of law, we address it. Our decision

The government points out that McGee did not testify at the trial, that it easily proved the terms of the agreement without McGee's testimony and that McGee made no attempt indirectly to testify about his knowledge or insinuate any special awareness of the agreement.

(4,5) It is clear that a prosecutor must not act as both prosecutor and witness. See United States v. Johnston, 690, F.2d 638, 642-43 (7th Cir. 1982). This is a part of the general "advocate-witness" rule that counsel should avoid appearing as both

> is "one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." Singleton v. Wulff, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826, 837 (1976).

advocate and witness except under extraordinary circumstances. See United States v. Crockett, 506 F. 2d 759, 760 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 37, 46 L.Ed 2d 40 (1975).[2] On the other hand, mere first-hand knowledge of facts that will be proved at trial is not a per se bar to representation. The issue before us falls between these two parameters. While McGee did not formally appear as a

[2]In Bonner v. City of Prichard, 661 F 2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

witness, he had more than mere knowledge of facts that would emerge at trial since his involvement in Hosford's immunity agreement was revealed to the jury by several witnesses.

The policy concerns that preclude a prosecutor from also appearing as a witness were well stated by the United States Court of Appeals for the Seventh Circuit:

> First, the rule eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government. Second, there is fear that the prestige or prominence of a government prosecutor's office will artificially enhance his credibility as a witness. Third, the performance of dual roles by a prosecutor might create confusion on the part of the trier of fact as

> to whether the prosecutor is speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier according testimonial credit to the prosecutor's closing argument. Fourth, the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that "justice must satisfy the appearance of justice." This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government. (foot-note omitted.)

United States v. Johnston, 690 F.2d 638, 643 (7th Cir. 1982).

(6,7) These considerations apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains "witness verity" in a case in which he appears as an advocate for the government. Thus, it would be improper for a government attorney who has independent personal knowledge about facts that will be

controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable.[3] See, e.g., id. at 642-43.

(8,9) In this case, McGee's selection as prosecutor did not rise to the level of reversible error.

[3]The trial court, of course, may dispose of the second factor by refusing to permit the prosecutor to testify, a matter within the court's sound discretion. See United States v. Bates, 600 F.2d 505,511 (5th Cir. 1979).

The record discloses that all references to McGee's participation were made in passing and without emphasizing his involvement. The contract was written and witnessed by several other persons, and introduced into evidence by Hosford. Moreover, McGee at no point implied that he was privy to special knowledge about the agreement or that any witness had misrepresented its terms. It also is significant that neither side indicated the need or desire to call McGee as a witness and Hosford did not object to McGee's assignment or conduct. While the dual role of prosecutor and quasi-witness are subject to strict scrutiny, under these circumstances McGee's appearance and conduct in this case

did not violate Hosford's right to due process.[4]

(10) Hosford next argues that the district court erred by admitting evidence of several prior bad acts unrelated to the crime for which he was charged. He alleges that these bad acts were not admissible under Rule 404(b) of the Federal Rules of Evidence, that they were not relevant to the issues in his case, see Fed. R..Evid. 401, and that whatever relevance they might have had was outweighed by their prejudice. See Fed. R.Evid. 403. We do not reach the merits of this issue because even assuming that the district court

[4]We emphasize the narrowness of our holding. The resolution of this issue depends on the peculiar facts of each case. Other similar cases arising out of different circumstances might constitute reversible error.

abused its discretion in admitting this evidence, see United States v. Kerris, 748 F.2d 610, 615 (11th Cir. 1984), it was at most harmless error. See Fed. R. Civ. P. 61; Tugwell v. A.F. Klaveness & Co., 320 F.2d 866-69 (5th Cir. 1963), cert, denied, 376 U.S. 951, 84 S.Ct. 967, 11 L.Ed.2d 970 (1964).

The evidence against Hosford was overwhelming. It included several tapes of conversations between Hosford and government agents,as well as the testimony of the agents, all of which clearly inculpated him in the murder plot. See Trial Transcript Vol. 5 at 4, 20-46, 66-75, 82, 84-85, 88, 96; Vol. 6 at 3-4, 10-14, 17-27, 29-36, 46-50; Vol 7 at 5-12; Vol 10 at 3-32. In addition, the man Hosford

originally contracted with testified that Hosford had agreed to pay him $35,000.00 to kill one of the target victims. Id., Vol 8 at 13-27. Other witnesses confirmed that the motive for the murders was to recoup insurance proceeds. Id., Vol 13 at 2-10; Vol. 14 at 2-8, Vol. 15 at 2-6; Vol. 16 at 4-19; Vol. 17 at 12-13; Vol. 18 at 3-4. The evidence clearly demonstrates beyond a reasonable doubt that Hosford solicited murder and took the additional step necessary for attempted murder - the two crimes for which he was convicted.

In summary, the evidence of guilt was of such magnitude that even if the prior bad acts testimony was

improvidently admitted, the error did not "affect the substantial rights of the parties." Fed. R.Civ.P. 61; see Securities Exchange Commission v. Chenery Corp., 318 U.S. 80,88,63 S.Ct. 454, 459, 87 L.Ed. 626,633 (1943).

We have considered the remaining assignments of error along with the voluminous record in this case and the relevant case law pertaining thereto. We conclude that they are without merit and warrant no further discussion.

The judgment of the conviction is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-3036

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RODNEY HOSFORD,

Defendant-Appellant.

On Appeal from the United States
Distrit Court for the Northern
District of Florida

ORDER:

Appellant's Suggestion That Unproduced Discovery Material Be Ordered Produced as a Part of the Record on Appeal is carried with the case.

S/ Joseph W. Hatchett
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

UNITED STATES,

Plaintiff/Appellee,

vs. Case No.:85-3036

RODNEY HOSFORD,

Defendant/Appellant.

NOTICE OF ADDITIONAL AUTHORITIES

Notice is hereby given that the Appellant/Defendant, RODNEY HOSFORD, will rely upon the following listed additional authorities in presenting the oral arguments:

1. United States v. Bagley, United States Supreme Court Slip Opinion, Case No. 84-48, Decided July 2, 1985.

2. United States v. Dekle, CA 11 768 F.2d 1257.

3. United States v. Holmes, CA 11 767 F.2d 820.

4. United States v. O'Neill, CA 11 767 F.2d 780.

5. Humphrey v. United States, CA 11 766 F.2d 1522.

6. United States v. Euceda-Hernandez, CA 11 768 F.2d 1307.

7. United States v. McKoy, CA9, 771 F.2d 1207.

S/ Jack F. White, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to DAVID L. McGEE, Tallahassee, Florida 32301, this 29th day of October, A.D., 1985.

S/ Jack F. White, Jr.
JACK F. WHITE, JR.